Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1806

JESSE L. GETZ,

Petitioner

VS.

EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF FOR RESPONDENT IN OPPOSITION

The Equitable Life Assurance Society of The United States, hereinafter referred to as the "Respondent", prays that the Petition for Writ of Certiorari to review a final order of the Supreme Court of the State of New Mexico, entered on March 11, 1977, be denied.

OPINION BELOW

The opinion of the Supreme Court of New Mexico is reported in the State Bar of New Mexico Bulletin, Vol. 16, No. 5, at 1736. The opinion appears at Appendix A of the Petition.

JURISDICTION

The final order of the New Mexico Supreme Court was made and entered in March 11, 1977. The order denying Petition for Rehearing was entered on March 23, 1977. That order appears at Appendix B of the Petition.

QUESTIONS PRESENTED

1. Whether Petitioner has demonstrated that the Chief Justice of the New Mexico Supreme Court had such an "interest" in the litigation as to disqualify him from participation.

2. Whether Petitioner waived or otherwise failed to timely exercise any right he may have had to disqualify the Chief Justice of the New Mexico Supreme Court.

3. Whether this case involved any question of Federal constitutional law.

4. Whether this case was decided primarily upon a question of fact.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of New Mexico, Article VI, Section 18:

"Sec. 18 [Disqualification of judges.]

"No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest. (As amended November 8, 1966)."

STATEMENT OF THE CASE

Jesse L. Getz, hereinafter referred to as the "Petitioner", was 56 years old at the time of trial. (Tr. 140). He was a mechanical engineer by education and profession and had worked for his employer, Sandia Corporation, in Albuquerque, New Mexico, from November 1956 through September 1973. (Tr. 140-141). From about 1967 or 1968, he worked specifically as a design engineer within the

mechanical engineering community. (Tr. 144). While employed at Sandia Corporation, Petitioner was insured under a group long-term disability policy issued to employees of the corporation by the Respondent. Under the policy in question, insured members of the group were entitled to benefits if totally disabled. In this context, total disability was defined as follows:

"For the purpose of this policy,

(a) an employee shall be considered totally disabled if he is wholly and continuously unable

(i) during the first two years of any one period of disability to perform any and every duty pertaining to his employment, and

(ii) during the remainder of such period of disability, to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience."

In October 1970, while insured under the above-mentioned policy, Petitioner suffered a myocardial infarction secondary to arteriosclerosis. (Tr. 52-53). In December 1970, after a period of treatment and recuperation, the Petitioner, on his physician's advice, returned to his regular job on a part-time basis. (Tr. 64, 150). In February 1971, he was released to full-time work without any restrictions or limitations. (Ibid.). From February 1971 until the fall of 1972, the Petitioner worked at his regular occupation. During that period of time, he was not under the care of any physician; he saw no physicians; he worked without complaint or visible limitation; and, he had no excessive absenteeism. (Tr. 270). For all intents and purposes, he had completely recovered from his heart attack.

In the fall of 1972, Petitioner heard a rumor at Sandia Corporation of an impending general layoff. (Tr.272). He became worried about his job and went to see the company physician in November, at which time he voiced his fears about losing his job. (Ibid.). Significantly, he made no mention of his heart condition, or of any problem with his heart, or his ability to perform the work. (Tr. 273). The company physician made an appointment for him with the company psychologist, but Petitioner failed to keep the appointment.

Petitioner continued to work at his regular employment thereafter. In February 1973, he was notified that he would be laid off

as part of a general layoff of Sandia Corporation employees. (Tr. 277). The people laid off were generally the least productive. The Petitioner's work production had never been very high, even before his heart attack. (Tr. 313). His evaluations by supervisors both before and after the heart attack showed that his productivity was about the same. (Tr. 241, 250, 309). Upon receipt of the notice of layoff, the Petitioner immediately filed a claim for disability retirement under Sandia Corporation's retirement plan. (Tr. 282). The application was investigated by Sandia's medical staff and a report was made to the the retirement committee. In the judgement of the medical staff, Petitioner was not totally disabled from doing the work of a design engineer. (Ibid.). As a consequence, the application for disability retirement was rejected by the retirement committee. (Tr. 284). However, Sandia Corporation did allow the Petitioner to remain on its payroll until September 1973, in order to qualify for early retirement benefits. Petitioner testified that, had he not been laid off, he would have continued to work for three and one-half years in order to qualify for full retirement benefits. (Tr. 278).

After he took early retirement in September 1973, the Petitioner filed a claim with the Respondent for benefits under the long-term disability policy on the ground that, in September 1973, he was totally disabled from performing his duties as a consequence of the 1970 heart attack.

Prior to trial, the Petitioner was examined and evaluated by four physicians, one of whom had been his treating physician in 1970. There was no evidence that his physical condition had changed from February 1971 until the time of the trial. Electrocardiograms taken in 1971, as compared with 1975, were stable and showed no change. (Tr.84). Petitioner's physical findings from February 1971 to the time of trial were identical. (Tr. 103-04). None of the physicians who examined the Petitioner found or observed any of the symptoms of which the Petitioner complained. (Ibid.). All of the physicians classified the Petitioner as a Class IA or Class IIB heart patient according to the American Heart Association Classification of Heart Patients. These classifications were:

"Class I. Patients with cardiac disease but without resulting limitations of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation,

dyspnea, or anginal pain.

"Class II. Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain.

"Class A. Patients with cardiac disease whose physical activity need not be restricted in any way.

"Class B. Patients with cardiac disease whose ordinary physical activity need not be restricted, but who should be advised against severe or competitive efforts."

Testimony at the trial from physicians established that the Petitioner could, at that time, perform the tasks of a mechanical engineer. (Tr. 106). His treating physician testified that it would be psychologically better for the Petitioner if he were to continue working. (Tr. 115). Disinterested witnesses testified that the job of a mechanical engineer is light and sedentary, and not particularly stressful. (Tr. 240, 311-12). A vocational expert analyzed the educational background of a mechanical engineer, the job requirements and the medical testimony, and concluded that the Petitioner was capable of performing the tasks of a mechanical engineer on a regular basis. (Tr. 327). He further testified that even if the Petitioner could not do the job of a mechanical engineer, there were numerous other occupations in which he could engage by using his existing educational background and work skills. (Tr. 329).

Based upon the evidence presented at the trial, the New Mexico Supreme Court held that findings of fact of the trial court that the Petitioner was totally disabled under the definitions in Respondent's long-term disability policy were not supported by substantial evidence. It stated:

> "Although it is not proper for us to disagree with a finding supported by substantial evidence, we can and must determine whether the evidence presented substantially supports a finding which has been properly attacked. Findings not supported by substantial evidence, and which have been properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed....

"We have read the transcript on appeal in this case and are convinced that there is no substantial evidence to support the finding of the district court that Getz is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience.' Since this finding is essential to the judgment entered in favor of Getz, that judgment cannot stand."

The Respondent's appeal from the judgment of the trial court was heard by a three-judge panel in the New Mexico Supreme Court, one of whom was Chief Justice LaFel E. Oman, now retired. There is no record of any remarks allegedly made by the Chief Justice during the course of oral arguments and Respondent disputes the narration of statements allegedly attributed to the Chief Justice by the Petitioner. Oral argument was conducted before the Supreme Court on June 23, 1976. The decision of the Supreme Court was rendered on March 11, 1977. At no time did the Petitioner move to have the Chief Justice recuse himself from the matter; or, otherwise attempt to disqualify the Chief Justice.

ARGUMENT

I.

Petitioner's first point for granting the Petition is that Chief Justice Oman of the New Mexico Supreme Court was biased or interested in the matter and that he was, therefore, deprived of a fair hearing. The argument is predicated entirely upon statements allegedly made by the Chief Justice during the course of oral argument on appeal. There is no record of the alleged statements and Respondent disputes the Petitioner's assertion that they were made. In the absence of any record upon which this Court can rely to substantiate the Petitioner's claims, the Petition should be denied.

If the remarks attributed to Chief Justice Oman by the Petitioner were, in fact, made, it would seem that the Petitioner would have done something immediately to preserve his rights or at least make a record of what occurred. He could have immediately requested a record; or, he could have requested that the Chief Justice recuse himself; or he could have filed a motion to disqualify the Chief Justice. Yet, he did none of these things. His statement that he

"presumed" that the Chief Justice would not participate in the decision is hollow and unconvincing. Petitioner's inaction belies his claim that alleged comments of the Chief Justice during the course of oral argument were as he has paraphrased them.

In addition to the foregoing, even if the remarks, as alleged, were made, the Petitioner failed to properly preserve his rights. Petitioner's argument is that, under Article VI, Section 18, of the Constitution of New Mexico, a justice may not participate in any case "in which he has an interest." The contention apparently is that Chief Justice Oman demonstrated an "interest" in the outcome of this litigation and could not participate in the decision. By his doing so, the Petitioner was denied due process and the equal protection of the laws of the State of New Mexico.

Petitioner's argument is interesting but it ignores the fact that the New Mexico constitutional provision is not automatic or self-executing. It has been consistently held in New Mexico that Article VI, Section 18, does not contain an absolute disqualification, but only confers a right upon litigants which they must exercise or waive. *Midwest Royalties, Inc, vs. Simmons,* 61 N.M. 399, 301 P.2d 334 (1956); *Gutierrez vs. Middle Rio Grande Conservancy District,* 34 N.M. 346, 292 P.1 (1929). If a litigant chooses to avail himself of the constitutional right he is required to file some motion or other appropriate pleading calling the ground for disqualification to the court's attention and demanding a ruling thereon. See, *Tharp vs. Massengill,* 38 N.M. 58, 28 P.2d 502 (1933). In this case, as stated above, the Petitioner made no effort, at the time Chief Justice Oman allegedly made the remarks attributed to him, to affirmatively disqualify the Justice; nor, did he file any pleading within a reasonable time thereafter calling the Supreme Court's attention to the claimed ground for disqualification. Oral argument was held on June 23, 1976, and the Supreme Court rendered its decision reversing the trial court on March 11, 1977, almost ten months later. Petitioner rested on whatever rights he had for that period of time and made no attempt to assert them until after the decision reversing a trial court judgment in his favor had been made. It is obvious that the Petitioner was content with the situation as long as he felt that the decision was going to be in his favor; and, that he has attempted to belatedly assert a claimed right only because his expectations were not

realized. However, under the plain language of the New Mexico constitutional provision, as well as the interpretations therof by the New Mexico Supreme Court, Petitioner's conduct constituted a waiver of any right to have the Chief Justice disqualified.

Finally, even if it is assumed that Chief Justice Oman made remarks exactly as alleged by the Petitioner, such remarks do not demonstrate an "interest" or "bias" that would be sufficient to disqualify him. It is well established that a judge is disqualified from acting in a case in which he has an "interest". *Evans vs. Gore,* 253 U.S. 245, 40 S.Ct. 550 (1920); *Slocum vs. Simms,* 5 Cranch 363, 3 L.Ed. 126 (1809). The prevailing view is that the disqualifying "interest" must be pecuniary or proprietary in nature. *In Re Bishop's Estate,* 250 F. 145 (9th Cir. 1918); *Lindsay-Strathmore Irrigation Dist. vs. Superior Court,* 187 P. 1056 (Cal. 1920): *Tatum vs. Southern Pacific Co.,* 58 Cal. Rptr. 237 (Cal.); *Kubat vs. Kubat,* 258 P.2d 897 (Colo); *In Re Heirich,* 140 N.E.2d 825 (Ill. 1957), cert, den., 355 U.S. 805, 78 S.Ct. 22 (1957); *Edwardsen vs. State,* 220 A.2d 547 (Md. 1966); *Hughes vs. Black,* 160 A.2d 113 (Md. 1960); *State ex rel Osborne vs. Chinn,* 121 S.E.2d 610 (W. Va.). In New Mexico, an "interest" sufficient to disqualify may also be an actual bias or prejudice. *State ex rel. Anaya vs. Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966). The words "bias" or prejudice" refer to the mental attitude of the judge toward a party to the litigation and not to any views that he may entertain regarding the subject matter involved. *Cole vs. Loew's, Inc.,* 76 F.Supp. 872 (S.D. Cal. 1948); *U.S. vs. 16,000 Acres of Land,* 49 F.Supp. 645 (D. Kan. 1943); *Hudspeth vs. State,* 67 S.W.2d 191 (Ark. 1933), cert. den., 296 U.S. 642, 56 S.Ct. 178 (1935). See, also, *Evans vs. Superior Court,* 290 P. 552 (Cal, 1930); *State vs. Waterman,* 210 P. 208 (Idaho 1922); *State ex rel. Mitchell vs. Sage Stores Co.,* 143 P.2d 652 (Kan. 1943), aff'd., 323 U.S. 32, 65 S.Ct. 9 (1944). "Bias" and "prejudice" mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward another. *Haslam vs. Morrison,* 190 P.2d 520 (Utah 1948). The fact that a judge may have an opinion as to the merits of the case or that he has strong feelings about the type of litigation involved does not make him biased or prejudiced. (Ibid.).

The Petitioner has not demonstrated that Chief Justice Oman had any pecuniary or proprietary interest in the subject matter of this

litigation; nor, has he shown any bias or prejudice in the sense of hostility or ill will toward the Petitioner personally. The language attributed to Chief Justice Oman, if it was uttered, shows at most that he had certain views concerning the subject matter of the litigation (viz., the capacity of a person who has suffered a heart attack). This was not sufficient to disqualify the justice from hearing the matter and does not establish that the Petitioner was deprived of due process or equal protection of the law. Since Chief Justice Oman was not, therefore, disqualified from acting in this matter, a majority of the justices of the new Mexico Supreme Court did decide the case in favor of the Respondent and the decision was proper in all respects.

II.

Petitioner's second point for granting the Petition for Writ or Certiorari is that the New Mexico Supreme Court in some manner changed New Mexico law and that, in so doing, treated the Petitioner differently from others similarly situated, thereby denying him equal protection of the law. It is contended that the consequence of this is that Petitioner is required to "return to work even though any work would expose him to great pain and further risk his life." "To prolong Petitioner's life it is necessary that he be free from mental and physical strain." The narration goes on that Petitioner is required to return to work to "adequately support his family." None of these arguments is supported by any transcript references and, as a matter of fact, they are untrue. Most people's lives would probably be prolonged if they were free from physical and mental strain. But, the fact that one's lifespan may be less because of the stresses and strains of daily living does not establish total disability under an insurance policy. Petitioner's own treating physician testified at the trial that it would be better for the Petitioner if he did return to work. And, all of the expert witnesses testified that he was capable of working. The implication that Petitioner cannot now "adequately support his family" is specious since there was evidence at the trial that Petitioner has no children living at home; that he is collecting early retirement benefits, from Sandia Corporation, as well as Social Security benefits; and, that his wife is a school teacher. He is apparently affluent enough to own a boat and spend his time fishing.

Furthermore, the new Mexico Supreme Court did not disregard its prior decisions in deciding Petitioner's case. The only two New Mexico cases involving long-term disability policies were *Bubany vs. New York Life Ins. Co.*, 39 N.M. 560, 51 P.2d 864 (1935); and, *Sawyer vs. Washington Nat'l Life Ins. Co.*, 78 N.M. 201, 421 P.2d 901 (1967). Both of these cases were briefed, discussed and argued in the trial court and before the New Mexico Supreme Court. Neither case involved a total disability provision which was "identical" to that of the Respondent in the instant case. And, neither case had facts similar to the instant case. It is obvious that the New Mexico Supreme Court did not consider either case to be controlling and rejected them as authority in the instant case. It did not, and had no reason to, overrule either of these decisions.

The foregoing illustrates Respondent's position that there is no substantial Federal question involved in this case. Petitioner has not specified any particular Federal question involved, nor has he cited any article, clause or amendment of the United States Constitution that was violated. It is evident from the arguments made by Petitioner under Point II that this case involves an interpretation of New Mexico law; and, certain findings of fact from the evidence. It is respectfully submitted that, in the interpretation of New Mexico law, the judgment of the New Mexico Supreme Court is superior and paramount. It is not within the jurisdiction of this Court to substitute its judgment of what New Mexico law should be as long as the state of the law in New Mexico does not contravene the Constitution of the United States. It was demonstrated by the Respondent before the New Mexico Supreme Court that the interpretation of Respondent's policy given by that Court is an accord with the prevailing weight of authority in the United States. *Continental Cas. Co. vs. Davidson*, 463 S.W. 2d 652 (Ark. 1971); *Prudence Life Ins. Co. vs. Wooley*, 182 So. 2d 393 (Miss. 1966); *Stout vs. Central Nat'l Life Ins. Co.*, 522 S.W. 2d 124 (Mo. 1975); *Rogers vs. Mutual Life Ins. Co.*, 122 S.W. 2d 5 (Mo. 1938); *Lainum vs. Continental Cas. Co.*, 469 P.2d 964 (Wash. 1970).

Furthermore, the critical element of the decision in the New Mexico Supreme Court involved a determination of facts. It should not be the function of this Court to substitute its judgment on the

facts for that of the state court. Thus, it is well settled that certiorari is not granted to review evidence. *United States vs. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1925). And, jurisdiction of this Court should not be exerted simply to review a state court's findings and conclusions of fact. *Fry Roofing Co. vs. Wood*, 344 U.S. 157, 73 S.Ct. 204 (1952); *Grayson vs. Harris*, 267 U.S. 352, 45 S.Ct. 317 (1925); *Portland Ry. Co. vs. Railroad Comm.*, 229 U.S. 397, 33 S.Ct. 820 (1913).

In summary, the legal question of the interpretation of Respondent's policy language had not been settled in New Mexico by prior decision. The New Mexico Supreme Court resolved that problem in a manner consistent with the interpretation of such contractual language in other jurisdictions. It further found, under the facts, that the Petitioner did not meet the requisite standard of total disability under the policy and its interpretation of the language. The Petitioner was not "singled out ... for unequal treatment" and was not, therefore, deprived of any constitutional rights.

III.

Petitioner's third point for granting his Petition for Writ of Certiorari is akin to the second point. The argument is to the effect that he contracted for long-term disability insurance at a time when there was a certain interpretation of disability policies in New Mexico; that the New Mexico Supreme Court decision in this case changed that interpretation; and, therefore, he was deprived of property without due process of law. Petitioner fails, however, to specify what the New Mexico law was at the time of contracting; and, what change was effected.

Respondent contended before the New Mexico Supreme Court that the policy involved contained two types of disability clause -- occupational disability during the first two years and general disability thereafter. Occupational disability clauses have been interpreted to mean that an insured is totally, occupationally disabled if he is unable to perform the substantial and material acts of his regular occupation. *Stoner vs. New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336 (1940). General disability clauses are usually interpreted to mean that an insured is totally disabled if he is unable to perform

the material and substantial acts necessary to the prosecution of any occupation within his education, training and experience. *World Ins. Co. vs. Hall,* 384 F.2d 138 (5th Cir. 1967). Neither of the two New Mexico decisions which pre-dated the Petitioner's policy involved an interpretation of both parts of a general disability policy containing occupational and general disability clauses. The issue was a novel one in New Mexico. Thus, the point is, that the New Mexico Supreme Court did not change the law or any of the Petitioner's contract rights by virtue of its interpretation.

Furthermore, the instant case was decided on the basis of certain findings of fact and not any novel, or different, legal interpretation. The New Mexico Supreme Court noted the evidence as follows:

> "The evidence was that on or about October 1, 1970, Getz suffered a coronary thrombosis or myocardial infarction and that he does have arteriosclerosis. A myocardial infarction causes some heart muscle damage, and, upon healing, leaves some scar tissue in the heart muscle. He was hospitalized on October 1, 1970, and remained in the hospital for about three weeks. After his discharge from the hospital he remained at home until December 7, 1970. He was largely resting and recuperating, but was permitted to engage in limited physical activity. On December 7, 1970, he returned to his work, but he was limited to four hours per day. In February 1971, he was returned to the performance of the full duties of his employment. In addition, he was on a program of physical exercise, including jogging. By the middle of 1971 he was jogging a mile of more, four or five days a week."

* * *

"In support of his position that he is wholly and continuously disabled to the extent required by this provision of the policy, Getz relies primarily upon his claim that all jobs for which he is fitted or may become reasonably fitted involve stress, and that after his retirement from Sandia he mailed out to different employers approximately 100 job applications and did not secure employment.

"The fact that there is stress in any job, or even in living, and the fact that he received no offer of a job in response to his applica-

tions, is no evidence of substance that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation for profit which he is or may become reasonably fitted by education, training or experience. He jogs for about a mile four or five times a week, he gardens, he fishes and he boats, and there is no evidence that he is unable to perform any of the ordinary activities of a normally sedentary life, or perform the duties of many types of employment for which he is or may become fitted.

"The physicians who had treated and examined him and who testified at trial, classified him as Class I or Class II under the functional classification and either Class A or Class B under the therapeutic classification of the American Heart Association Classifications for heart patients....

* * *

"Both physicians who testified on behalf of Getz stated there were certain types of employment which he could perform. His treating physician named drafting and technical writing as two forms of employment in which he could engage. The other doctor made the general statement that Getz could perform light and sedentary types of work. Work as a mechanical engineer was repeatedly referred to by witnesses as being sedentary. There is evidence that Getz' duties in engineering design did involve some stress, perhaps more than at least some other employments in the field of mechanical engineering. His employment also required occasional lifting of heavy equipment for which he would seek assistance, since his doctor advised he should not lift heavy objects. However, because his particular duties caused him some discomfort and distress three or four times a week and involved occasional physical activity which he could not perform alone, it does not follow that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. There was undisputed testimony from a vocational analyst concerning many types of employment which Getz could do, and his treating physician testified he would be better off psychologically if he did work."

Thus, according to the New Mexico Supreme Court, the Petitioner

failed to prove that he was wholly and continuously unable to perform the material acts necessary to the prosecution of his occupation as a mechanical engineer and that he was wholly and continuously unable to perform the material acts necessary to the prosecution of any occupation for which he was fitted by reason of education, training and experience.

Petitioner asserts that the public policy of New Mexico to compensate individuals for disability is embodied in the New Mexico Workmen's Compensation Act. Section 59-10-12.18 N.M.S.A. (1953 Comp.). That section provides:

> "59-10-12.18 Total Disability. -As used in the Workmen's Compensation Act [59-10-1 to 59-10-37], 'total disability' means a condition whereby a workman by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience."

It is interesting to note that the test of total disability under the New Mexico Workmen's Compensation Act, relied upon by the Petitioner, is almost identical to the language of the Respondent's policy. It is difficult, therefore, to understand how the Petitioner can assert that the decision in the instant case was contrary to the public policy of the State of New Mexico.

Finally, it might be pointed out that certain other assertions by the Petitioner under Point III are without any evidentiary foundation and otherwise take certain liberties with the actual facts. The Petitioner was not discharged from employment because of inability to perform work as a consequence of his physical condition. Testimony revealed that his physical condition had nothing to do with the layoff. (Tr. 245). He was retired early as a part of a general layoff of the least productive employees. And, Petitioner had always been one of the employer's least productive employees. Neither was there any evidence that the Petitioner purchased Respondent's long-term disability insurance based upon a particular interpretation of disability

insurance policies by the New Mexico Supreme Court. Petitioner would lead us to believe that, despite the clear, unequivocal and unambiguous language of Respondent's policy, the New Mexico Supreme Court would have interpreted such language to mean that an insured was totally disabled if substantially unable to perform the material acts of his regular occupation, regardless of his ability to perform other work; that he was aware of such interpretation; and, that he contracted in reliance that the Supreme Court would interpret his disability policy in that manner. The assertion is so incredible that it merits no further comment. The New Mexico Supreme Court had never interpreted two-part disability policies similar to the Respondent's, in the manner alleged; and, even if it had, Petitioner failed to sustain his burden of proof. He did not prove an inability to perform substantially all the acts material to the occupation of a mechanical engineer, much less any other occupation for which he was fitted by reason of education, training and experience.

IV.

The Petitioner's Federal questions were not all timely raised. There can be no question that the Petitioner failed to properly assert his claim that Chief Justice Oman was disqualified from participating in the case. That contention was raised for the first time on a Motion for Rehearing. Petitioner knew, or should have known, of the ground for disqualification at the time of oral argument, almost ten months before the Supreme Court decision. The ground for disqualification, if any existed, should have been brought to the attention of the New Mexico Supreme Court as soon as the Petitioner was aware of it. His failure to do so prevents his obtaining further relief by way of Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari to review the order and decision of the Supreme Court of the State of New Mexico be denied.

Respectfully submitted,

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